89-608

Supreme Court, U.S.
FILED
OCT 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1989

DR. LEE ROY BLACK, et al.,

Petitioners,

vs.

JOHN BOLIN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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15 pp.

QUESTIONS PRESENTED

1. DOES THIS COURT'S ANALYSIS IN *WHITLEY V. ALBERS* ALLOW LIABILITY UNDER THE EIGHTH AMENDMENT ON A PRISON INMATE'S EXCESSIVE FORCE CLAIM WITHOUT REQUIRING THE JURY TO EXPRESSLY FIND THAT THE FORCE USED WAS MALICIOUS AND SADISTIC FOR THE VERY PURPOSE OF CAUSING HARM.

2. DOES THIS COURT'S ANALYSIS IN *WHITLEY V. ALBERS* ALLOW IMPOSITION OF LIABILITY ON AN EIGHTH AMENDMENT EXCESSIVE FORCE CLAIM UNDER A 'DELIBERATE INDIFFERENCE' STANDARD RATHER THAN THE HEIGHTENED 'MALICIOUS AND SADISTIC' STANDARD.

3. WHETHER LIABILITY MAY BE IMPOSED FOR AN EIGHTH AMENDMENT CLAIM OF EXCESSIVE FORCE ABSENT A JURY FINDING OF ANY INJURY AND, IF NOT, DOES THE CONSTITUTION REQUIRE THE INJURY BE "SERIOUS" OR "SIGNIFICANT".

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellants

(now petitioners)

R. Dale Riley, Assistant Director of the Division of Adult Institutions for the Missouri Department of Corrections

Members of the Correctional Staff at the Missouri Training Center for Men in Moberly, Missouri: Major Willie Dennis, Captain Denver Halley, Lieutenant William Arney, Correctional Officers Clarence Williams and Robert Wilson

Bill Armontrout Associate Warden of the Missouri State Penitentiary

Members of the Penitentiary Emergency Squad: Captain Robert Borghardt, Lieutenant James Eberle, Corrections Officers Robert Malone, Tom Davis and Michael Plemmons

Appellees

(now respondents)

John Bolin

Douglas McWorthy

Billy Wilson

Melvin Steagal

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CONSTITUTIONAL PROVISION:

Eighth Amendment to the United States Constitution 8, 11, 12, 13, 17

STATUTE:

42 U.S.C. 1983 2

OPINIONS BELOW

The opinion of the court of appeals is reported at 875 F.2d 1343. The opinion is reprinted at Appendix p. 18. The opinion of the District Court is unreported but is reprinted at Appendix p. 34.

JURISDICTION

The petitioners identified above petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 and § 1343(3) and (4).

The opinion of the court of appeals was entered on May 26, 1989. Rehearing en banc was denied on July 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The relevant Constitutional provision involved in this case is the Eighth Amendment which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This petition arises from a decision of the Eighth Circuit Court of Appeals affirming in all respects an

order of the District Court for the Western District of Missouri upholding a jury verdict against prison officials for excessive use of force under the Eighth Amendment to the United States Constitution. The litigation arose out of a civil rights action, filed pursuant to 42 U.S.C. § 1983, by three inmate plaintiffs against Missouri Department of Corrections officials for injuries allegedly received as a result of excessive force used to quell a prison riot.

The allegations stem from a prison riot which occurred at the Missouri Training Center for Men in Moberly, Missouri (hereinafter "MTCM") in July, 1983. On July 3, 1983, at approximately 9:30 p.m., Correctional Officer I Thomas G. Jackson entered wing B of Housing Unit 2 of MTCM, to locate and remove an intoxicated inmate from the wing. When Jackson was unable to peaceably remove the inmate, he summoned assistance. At approximately 9:45 p.m., seven additional officers reported to the housing unit. Three of the officers entered the wing to locate and remove the inmate.

As the officers were escorting the inmate to the rotunda or control area of the Housing Unit, thirty to thirty-five inmates rushed the officers. The inmates, armed with homemade weapons, succeeded in forcing their way into the rotunda area where they fought with the seven to eight officers. During the fight, Officer Jackson was fatally stabbed and other officers were wounded. The correctional officers managed to force the inmates back into the wing, but could not get the inmates to disperse and return to their rooms. A majority of the 330 inmates in three wings of Housing Unit Two rushed the glass to the rotunda, broke the glass, threatened the officers, and refused to return to their rooms.

An institutional emergency was declared and responding officers drew shotguns and ammunition from the institutional control center armory and proceeded to Housing Unit Two. At approximately 10:12 p.m., on July 3, 1983, the inmates were ordered to return to their rooms and when they did not comply, shots were fired into the ceilings of the various wings of the Housing Unit. The weapons used by the officers were riot shotguns loaded with bird shot. The inmates continued to charge the rotunda for a time but eventually returned to their rooms. When sufficient help became available, the inmates were deadlocked into their rooms, there being no central electronic doorlock in the housing unit.

At approximately 11:30 p.m., a room to room inspection, checking for injured inmates, was conducted. Medical treatment was administered. Inmates identified by correctional officers as participating in the murder of Officer Jackson, the wounding of other officers, or the riot, were escorted to the housing unit rotunda where they were handcuffed and moved to other MTCM housing units. At approximately 6 a.m. on the morning of July 4, 1983, an institutional search was conducted to remove weapons and intoxicating substances from all the housing units. Inmates involved in the riot and murder were transported to the Missouri State Penitentiary (hereinafter "MSP") by bus on July 4, 1983. Plaintiffs were sent to MSP on the bus.

Plaintiffs alleged that they were beaten by MTCM officers with clubs, fists and shotgun butts while they were in the housing unit rotunda and again when they were transported by the MSP emergency squad by bus to MSP. Plaintiffs testified that as a result of the beatings,

they suffered headaches, bruises, soreness and scratches. In addition, plaintiff McWorthy testified to having some cracked teeth. The medical records recorded the following injuries:

Plaintiff Bolin: a hematoma and abrasion above the left eye, some bruising, handcuff marks on both wrists, scratches on the right lower back and a bruise on the right calf.

Plaintiff McWorthy: abrasions right lower leg, swelling of the jaw and left side of his back, a chipped left molar, bruises on calves and left foot and an abrasion on left knee and calf.

Plaintiff Wilson: left flank bruise

Defendants argued to the jury that the plaintiffs' injuries resulted from their assault on the corrections officers, touching off the riot.

The case was tried to a jury before the Honorable United States Magistrate William A. Knox. At the close of the evidence, the jury was given the following instruction on the Eighth Amendment prohibition against cruel and unusual punishment:

INSTRUCTION NO. 11

> The Eighth Amendment to the United States Constitution provides that no cruel and unusual punishment may be inflicted. This protection against cruel and unusual punishment prohibits assaults without justification on prison inmates by corrections officers. In order for a corrections officer's use of force against any inmate to constitute cruel and unusual punishment, it must

involve the unnecessary and wanton infliction of pain. To be "wanton," the official must have intended to harm the inmate.

"Pain" means more than momentary discomfort; the defendant's action must have resulted in either pain or injury. To be "unnecessary" or "excessive," the force used must have been more than appeared reasonably necessary at the time of the use of the force to maintain or restore discipline.

The management of prison inmates by corrections officers may require and justify the occasional use of a degree of intentional force. Not every push or shove violates an inmate's constitutional rights. In determining whether force used is unnecessary or excessive, the jury must consider such factors as the need for the application of force, the relationship between the need and the amount of force used, the extent of injury inflicted, and whether force was applied in a reasonable effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Appendix p. 15.

The verdict director submitted for the jury to find for any of the three plaintiffs and against any defendant alleged to have actually struck a plaintiff was as follows:

Your verdict must be for Plaintiff Bolin and against Defendant Dennis, on Plaintiff's claim regarding the use of excessive force, if you believe:

First, Defendant Dennis intentionally hit, kicked or beat Plaintiff Bolin, and

Second, the use of such force was excessive under the circumstances as that phrase is explained in Instruction No. 11.

Appendix p. 16.

Plaintiffs sued several defendants acting in a supervisory capacity. An example of the verdict directing instructions for the supervisor's liability is as follows:

> Your verdict must be for Plaintiff Bolin and against Defendant Dennis, on Plaintiff's claim regarding the failure of Defendant Dennis to protect Plaintiff Bolin and to supervise his subordinates, if you believe:
>
> First, that Plaintiff Bolin was intentionally kicked, beaten or hit by an employee of the Missouri Department of Corrections, and
>
> Second, the use of such force was excessive under the circumstances as that phrase is explained in Instruction No. 11, and
>
> Third, that Defendant Dennis had a duty to protect Plaintiff Bolin and to properly supervise the individual who hit, kicked, or beat Plaintiff Bolin, and
>
> Fourth, that Defendant Dennis knew or was deliberately indifferent to Plaintiff Bolin's need to be protected from such injuries, and
>
> Fifth, that Defendant Dennis with deliberate indifference to or conscious disregard for the rights of Plaintiff Bolin failed or refused to properly supervise his subordinates to prevent such injuries.

Appendix p. 16.

The jury returned a verdict in favor of plaintiffs awarding Plaintiff Bolin actual damages of $32,000, and punitive damages of $63,000; Plaintiff McWorthy actual damages of $34,000 and punitive damages of $74,000 and Plaintiff Wilson actual damages of $32,000 and $73,000 in

punitive damages. The magistrate reduced some of the awards as duplicative: Bolin received $9,500 in actual damages and $56,000 in punitive damages; McWorthy received $14,500 in actual damages and $74,000 in punitive damages; Wilson received $14,000 in actual damages and $73,000 in punitive damages. A total of $241,000 in damages was awarded to the three plaintiffs against eleven prison officials, including five supervisory officials.

Following the denial of defendants' alternative motion for judgment notwithstanding the verdict, new trial and remittitur, an appeal was taken. The matter was briefed and then argued to the United States Court of Appeals for the Eighth Circuit on January 9, 1989. *Bolin v. Black*, 875 F.2d 1343 (8th Cir. 1989). On May 26, 1989, the Eighth Circuit filed its opinion affirming the lower court's judgment. Appendix p. 18. Defendants timely filed their petition for rehearing en banc, or alternatively, for rehearing by the panel, which was denied by the Eighth Circuit on July 10, 1989. Appendix p. 1.

REASONS FOR GRANTING THE WRIT

A. DOES THIS COURT'S ANALYSIS IN *WHITLEY V. ALBERS* ALLOW LIABILITY UNDER THE EIGHTH AMENDMENT ON A PRISON INMATE'S EXCESSIVE FORCE CLAIM WITHOUT REQUIRING THE JURY TO EXPRESSLY FIND THAT THE FORCE USED WAS MALICIOUS AND SADISTIC FOR THE VERY PURPOSE OF CAUSING HARM.

This case presents a unique opportunity for this Court to clarify the legal principles concerning liability for an Eighth Amendment excessive force claim against prison officials. As demonstrated below, the lower courts have applied inconsistent standards in Eighth Amendment excessive force cases. This case also allows this Court to clarify jury instructions to be used when assessing Eighth Amendment liability against prison officials, including prison supervisory officials. The three questions presented to this Court for consideration are in substantial respects interrelated.

The jury instructions in the case at bar allowed the jury to return a finding against prison officials without an express finding that the force used was applied maliciously or sadistically for the very purpose of causing harm. The jury instructions also allowed imposition of liability against prison supervisory officials under a "deliberate indifference" standard, again without an express finding that prison officials acted sadistically or maliciously. Finally, the jury instructions allowed imposition of liability without an express finding that the plaintiff inmate suffered any injury.

The judgment below rests upon a fundamental misconception of this Court's decision in *Whitley v. Albers*, 475 U.S. 312 (1986) and conflicts with a number of other decisions in the courts of appeals, including a prior decision of the Eighth Circuit itself.

In *Whitley*, like the case at bar, this Court analyzed the dictates of the Eighth Amendment in the context of a prison disturbance that involved the taking of a correctional officer as a hostage. Unlike *Whitley*, the case at bar presents a situation where an experienced and long time correctional officer was killed by prison inmates during a riot.

This Court identified the following test to be applied in such cases:

> "Where a prison security measure is undertaken to resolve a disturbance, such has occurred in this case, that indisputably poses significant risk to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm."

Id. at 320-321. This Court emphasized that unless an inference of wanton and sadistic infliction of pain arises from the facts as plead, "the case should not go to the jury." *Id.* at 322. In the case at bar, the instructions as set forth above indicate that the jury was allowed to return a finding of liability without expressly finding that the force used was applied maliciously or sadistically for the very purpose of causing harm.

The confusion in the courts below cannot be better demonstrated than by comparing the Eighth Circuit's decision in this case with a prior Eighth Circuit decision. In *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988), a prison inmate brought suit under the Eighth Amendment claiming a prison guard had slammed the inmate's hand in a food service door. The Court considered that the inmate's "refusal to shut the door when directed to do so was such a disturbance because a significant security threat was posed." *Id.* at 699. Therefore, the Eighth Circuit held that the *Whitley* standard must be applied. In *Cowans*, the jury found in favor of the inmate but awarded zero dollars in damages. The trial court, *sua sponte*, awarded damages of One Dollar ($1.00). *Id.* at 698. The Eighth Circuit reversed, finding that the jury was improperly instructed under *Whitley*. The Court held that the jury must be instructed and required to find that unnecessary and wanton infliction of pain occurred and the force was applied sadistically or maliciously for the very purpose of causing harm. *Id.* at 699-700.

In the case at bar, the Court distinguished *Cowans* stating that *Cowans* "involved a threat to institutional security." *Bolin v. Black*, 875 F.2d 1343, 1350 (8th Cir. 1989). The Court stated that the case at bar involved use of force after any threat to institutional security had been quelled and therefore *Cowans* did not control. *Id.*

Initially, it should be noted that the Eighth Circuit's attempt to distinguish *Cowans* is unpersuasive. In one case, the Eighth Circuit holds that an inmate locked in his cell creates a security disturbance by refusing to close his food service slot. In the instant case, the Eighth Circuit

holds that security measures enacted to quell a full scale prison environment in which one officer was killed and several injured does not give rise to a security disturbance. The Eighth Circuit's opinion is a clear example of why this Court has repeatedly emphasized that judicial officers should defer to security decisions made by experienced prison officials.

This Court recently clarified the law on excessive force claims filed under the Fourth Amendment in *Graham v. Connor,* 109 S.Ct. 1865 (1989) saying

> "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard." [citations omitted].

Id. at 1870. Given the inconsistent application by the lower courts of this Court's holding in *Whitley v. Albers,* petitioners respectfully submit that clarification is needed for the standard to be applied in claims of excessive force under the Eighth Amendment.

Review of this case is necessary in order for this Court to clarify the application of *Whitley.* By attempting to set forth distinctions as to when a prison incident becomes a disturbance, the Eighth Circuit promotes an unworkable and illogical application of the *Whitley* standards. The volatile prison environment cannot be placed in neat little categories within the calm of a judge's chambers. The applicability of Eighth Amendment

liability should not turn on a post-hoc judicial determination of whether a disturbance in fact exists.[1]

B. DOES THIS COURT'S ANALYSIS IN *WHITLEY V. ALBERS*, ALLOW IMPOSITION OF LIABILITY ON AN EIGHTH AMENDMENT EXCESSIVE FORCE CLAIM UNDER A 'DELIBERATE INDIFFERENCE' STANDARD RATHER THAN THE HEIGHTENED 'MALICIOUS AND SADISTIC' STANDARD?

As noted above, the jury instruction in this case allowed a finding of liability against prison supervisory officials under the "deliberate indifference" standard. This Court specifically rejected the deliberate indifference standard in *Whitley* on a Eighth Amendment excessive force claim. This Court emphasized that the deliberate indifference standard "was appropriate in the context presented in [*Estelle v. Gamble*] because the state's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Whitley*, 475 U.S. at 320. In a situation where prison security and the safety of both prison officials and inmates is threatened, this Court has rejected a deliberate indifference standard. *Whitley* holds:

---

[1] In practice, a prison inmate will always claim that he was not creating a disturbance or involved in any disturbance. If the record viewed after a jury finding of liability is considered in the light most favorable to the plaintiff inmate, then it will be a rare occasion when the *Whitley* standards would apply.

> "In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance."

Id. The Court went on to hold that the applicable liability standard requires a finding of unnecessary and wanton infliction of pain and turns on whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Id.* at 320-321.

Last term, three justices of this Court dissented from the denial of certiorari in *Dudley v. Stubbs*, 109 S.Ct. 1095 (1989) (denying certiorari to 849 F.2d 83 (2nd Cir. 1988)). Justices O'Connor and Kennedy, along with Chief Justice Rehnquist, dissented from the denial of certiorari finding that the judgment therein rested upon a fundamental misconception of *Whitley*. These three justices also noted that the conflicting approach taken by the Courts of Appeals, including inconsistent decisions within the Second Circuit itself. These three justices also noted that *Dudley v. Stubbs*, may have represented an "aberrational" decision. As the instant case demonstrates, the lower courts continue to be confused concerning the applicability of *Whitley*. This case presents a unique opportunity to settle numerous questions concerning the proper standard for liability under an Eighth Amendment excessive force claim. The inconsistent applications of *Whitley* in the Second Circuit have now manifested within the Eighth Circuit. Intervention is needed immediately by

this Court in order to clarify the law and to give guidance to all courts dealing with prisoner litigation.

C. WHETHER LIABILITY MAY BE IMPOSED FOR AN EIGHTH AMENDMENT CLAIM OF EXCESSIVE FORCE ABSENT A JURY FINDING OF ANY INJURY AND, IF NOT, DOES THE CONSTITUTION REQUIRE THE INJURY BE "SERIOUS" OR "SIGNIFICANT"?

It is long been held that the extent of a plaintiff's injury is a relevant factor to be considered in determining whether or not the punishment, about which he or she complains, was cruel and unusual. *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.), *cert. denied sub. nom, John v. Johnson*, 414 U.S. 1033 (1973); cited with approval in *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 1085 (1986). In fact, the Eighth Circuit in *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1989) held "Indeed, a court must look to the extent of the pain inflicted in determining whether a constitutional deprivation occurred. *Johnson v. Glick*, 481 F.2d at 1033."

In this litigation the Court of Appeals allowed a jury verdict awarding a total of $241,000 in damages to stand despite the fact that the jury was not required to consider the extent of injuries suffered by plaintiffs. Petitioners respectfully submit that this Court's holding in *Whitley*, raises a serious question as to the correctness of the Eighth Circuit's holding. In *Whitley*, the Ninth Circuit reversed a directed verdict for petitioners pointing

> "to evidence that the general disturbance in cell-block 'A' was subsiding and to respondent's experts' testimony that the use of deadly force was excessive under the circumstances and

> should have been preceded by a verbal warning."

Whitley v. Albers, 106 S.Ct. at 1083. This Court held that

> "As the District Judge correctly perceived, 'such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' [citation omitted] are relevant to that ultimate determination."

Id. 106 S.Ct. at 1085.

Clarification by this Court is necessary in order to assist lower courts in evaluating constitutional claims of excessive force. A common law battery claim does not automatically become a constitutional claim simply because the actor is a state official. Federal courts are courts of limited jurisdiction and litigation of constitutional claims should be limited to only those applications of force that result in serious, substantial or significant injury. Otherwise, the federal courts simply become another forum in which to litigate state law battery claims.

The lower federal courts have been struggling with this issue. For example, in *Black Spotted Horse v. Else*, 767 F.2d 516 (8th Cir. 1985), an inmate claimed that an officer pushed him into the wall of his cell, "striking and bruising [his] leg." *Id.* at 517. The Eighth Circuit held that a "relatively minor injury" did not state a claim under the Eighth Amendment. *Id.* The Court emphasized that the claim may have been a battery under state law but it was not a constitutional violation. In the case at bar, the

injuries suffered by plaintiffs, as shown by objective medical records, are substantially similar to the claim in *Black Spotted Horse*.

Additionally, the Eighth Circuit in *Rodgers v. Thomas*, 870 F.2d 380 (8th Cir. 1989), examined Rodgers' allegations that he "suffered from flu symptoms after being placed in the isolation cell, and he presented no evidence of physical or emotional pain or injury." *Id.* at 384. The Court concluded that the pain and injury suffered by plaintiff was minimal, if any. Finding that, the Court concluded that Rodgers "did not suffer 'unnecessary and unwanton infliction of pain' and thus was not subjected to cruel and unusual punishment." *Id.* at 385.

In *Brown v. Smith*, 813 F.2d 1187 (11th Cir. 1987), the Court granted summary judgment on an excessive force claim finding that the "extent-of-injury factor" was an important consideration. The Court held that since the inmate received a "minimal injury", there was no constitutional claim. *Id.* at 1189. In *Pressly v. Gregory*, 831 F.2d 514, 518 (4th Cir. 1987), the inmate had alleged injuries to his face and groin that caused pain for weeks following the incident. The medical records revealed "no verifiable injury" and the Eleventh Circuit affirmed the grant of summary judgment to prison officials. *Id.* at 518.

In *Hines v. Boothe*, 841 F.2d 623 (5th Cir. 1988), the inmate alleged that an officer "grabbed him and shoved him against a brick wall, causing great pain to [the inmates] body and head." The Fifth Circuit held that constitutional claims of excessive force will only arise where the officers' action cause "severe injuries". *Id.* at 624.

The Fifth Circuit also has recognized that a "significant injury" must be inflicted before a claim is constitutionally actionable. *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989). Petitioners submit that the view of the Fifth Circuit is more consistent with the intent of this Court. This requirement of a severe injury is necessary in order to prevent the litigation of state common law battery claims under the guise of the Eighth Amendment.

In the instant litigation the Court of Appeals stated "Because proof of actual damages is unnecessary to establish a constitutional violation, it follows that damages need not be an element to be proved in the verdict director." *Bolin v. Black*, 875 F.2d 1343, 1350 (8th Cir. 1989); Appendix p. 18.

Petitioners respectfully submit the internal inconsistency within the Eighth Circuit as well as the conflict between federal circuit courts of appeal on this issue warrant resolution by this Court.

CONCLUSION

For the reasons given, petitioners respectfully request this Court to grant a writ of certiorari.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

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Assistant Attorney General
(Counsel of Record)

Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1762WM	*
John Bolin, et al,	*
Appellees,	* Order Denying Petition
vs.	* For Rehearing and Suggestion For Rehearing En Banc.
Dr. Lee Roy Black, et al,	*
Appellants.	* (Filed July 10, 1989)

Appellees' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

July 10, 1989

Order entered at the Direction of the Court;

/s/ Robert D. St. Vrain.
Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN BOLIN, DOUGLAS MCWORTHY, MELVIN STEAGAL and BILLY WILSON, Appellant,	)	No. 88-1762WM
v.	)	
DR. LEE ROY BLACK, et al., Appellees.	)	

PETITION FOR REHEARING EN BANC, OR ALTERNATIVELY, FOR REHEARING BY THE PANEL

Come now Dr. Lee Roy Black, et al., by and through their attorneys, pursuant to Fed.R.App.P., Rule 35 and Rules 15 and 16 of the United States Court of Appeals for the Eighth Circuit, and move this Court to set aside its opinion issued in the above-entitled cause on May 26, 1989, and grant a rehearing thereof on the grounds that certain aspects of the opinion conflict with prior decisions of the United States Supreme Court and with prior decisions of this Court, present questions of exceptional importance and overlook or misconstrue significant issues.

In support thereof, the appellants submit the following statement and memorandum.

Required Statement

I express a belief, based on a reasoned and studied professional judgment that the decision is contrary to the

following decisions of the Supreme Court of the United States and of the United States Court of Appeals for the Eighth Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *Graham v. Connor*, 57 U.S.L.W. 4513 (U.S. May 16, 1989); *Whitley v. Albers*, 475 U.S. 312 (1986); *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1989); *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); *Wilson v. City of North Little Rock*, 801 F.2d 316 (8th Cir. 1986).

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1. May a federal court consistent with the holdings in *Graham v. Connor, supra; Whitley v. Albers, supra; Cowans v. Wyrick, supra;* and *Holloway v. Lockhart, supra,* permit a finding of liability on an inmate's claim of a violation of the Eighth Amendment through the use of excessive force by prison officials during the quelling of a prison riot, without requiring the jury to find that the force was used "maliciously and sadistically for the very purpose of causing harm" or at the very least that the force constituted an "unnecessary and wanton infliction of pain"?

2. May a federal court consistent with the holding in *Wilson v. City of North Little Rock, supra,* permit a finding of liability against supervisory prison officials on an inmate's claim of a violation of the Eighth Amendment through the use of excessive force by his subordinates during the quelling of a prison riot, and subsequent security measures, when there is no evidence that (1) the supervisor directed the use of force claimed to violate the Eighth Amendment or (2) the supervisor had any actual

knowledge of any of the claimed violations and either affirmatively countenanced them or acquiesced in their commission?

Statement of the Case

On July 2, 1986, appellees filed this cause of action under 42 U.S.C. Section 1983 in the United States District Court for the Western District of Missouri, Central Division. Appellees sought to recover money damages for the alleged violation of their constitutional right to be free from cruel and unusual punishment by appellants, officials of the Missouri Department of Corrections and Human Resources. Appellees alleged that excessive force was used when a July, 1983 prison riot at the Missouri Training Center for Men, which resulted in the death of a correctional officer, was quelled and security measures were taken to separate the participants. The cause went to trial before a jury and the Honorable William A. Knox, United States Magistrate, by consent of the parties pursuant to 28 U.S.C. Section 636(c), on August 10, 1987. The appellees testified to various injuries they alleged resulted from the use of excessive force. Institutional medical records were introduced reflecting that appellees sustained a few bruises and scratches. Appellants maintained the appellees' injuries resulted from their assault on the correctional officers, touching off the riot.

The jury returned a verdict in favor of appellees awarding: Appellee Bolin actual damages $32,000, and punitive damages $63,000; Appellee McWorthy actual damages $34,000 and punitive damages $74,000 and Appellee Wilson actual damages $32,000 and $73,000

punitive damages. The magistrate reduced some of the awards as duplicative: Bolin actuals $9,500, punitives $56,000; McWorthy $14,500 in actuals and $74,000 punitives; Wilson $14,000 in actuals and $73,000 in punitives.

Following the denial of appellants' alternative motion for judgment notwithstanding the verdict, new trial and remittitur, an appeal was taken. The matter was briefed and then argued to this Court on January 9, 1989. On May 26, 1989, this Court filed its opinion affirming the lower court's judgment.

Argument

This Court should, consistent with the holdings, in *Graham v. Connor; supra, Whitley v. Alpers, supra; Cowans v. Wyrick, supra* and *Holloway v. Lockhart, supra* require in a claim under the Eighth Amendment that excessive force was used, that a finding be made that the force was used maliciously and sadistically for the very purpose of causing harm before a verdict may be awarded.

Shortly before the panel issued its opinion in the instant cause, this Court decided *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988). The *Cowans* Court ruled that plaintiff's $1.00 verdict could not be sustained in light of the erroneous instructions given. The Court held:

> The district court's instruction was as follows:
>
> [T]he conduct of corrections officers will constitute cruel and unusual punishment if the force is applied intentionally for the very purpose of causing harm and not applied in a good faith effort to maintain and restore discipline.

> In determining whether the constitutional line has been crossed by the use of intentional force, the jury *may* consider * * * the extent of the injury inflicted. (Emphasis added).
>
> The district court's instruction was flawed in two respects. First, it seems to have allowed the jury to find for the plaintiff if it found that Douglas's use of force was not applied in a good faith effort to maintain and restore discipline. We do not believe that such a finding, standing alone, is sufficient to establish Cowan's claim.
>
> [5] We read *Whitley* to mean that if force is applied in a good faith effort to maintain or restore discipline, then there is no cruel and unusual punishment. *See, id.* Cruel and unusual punishment exists, in the context of prison security, only where force is applied maliciously and sadistically for the very purpose of causing pain and suffering. *See id.*
>
> [6] Secondly, the instruction allowed the jury to find for Cowans without finding that he had suffered any pain, misery, anguish or similar harm, whether capable of estimation or not. The extent of injury inflicted is not just something that a jury may consider, it is a relevant factor as to whether or not the punishment inflicted was cruel and unusual.

Cowans v. Wyrick, supra at 699-700.

The instructions in the instant cause required even less of the jury than did the *Cowans'* instructions:

> "Your verdict must be for Plaintiff ___ and against Defendant ___, on Plaintiff's claim regarding the use of excessive force, if you believe:
>
> First, Defendant ___ intentionally hit, kicked or beat Plaintiff ___, and

> Second, the use of such force was excessive under the circumstances as that phrase is explained in Instruction No. ___."
>
> * * *
>
> " . . . To be "unnecessary" or "excessive," the force used must have been more than appeared reasonably necessary at the time of the use of the force to maintain or restore discipline.
>
> The management of prison inmates by corrections officers may require and justify the occasional use of a degree of intentional force. Not every push or shove violates an inmate's constitutional rights. In determining whether force used is unnecessary or excessive, the jury must consider such factors as the need for the application of force, the relationship between the need and the amount of force used, the extent of injury inflicted, and whether force was applied in a reasonable effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."

In considering this question, the panel chose to distinguish the *Cowans* holding saying "Cowans was injured when a prison guard slammed a food slot door shut on his hand . . . *Cowans* differs from the current case, however, in that *Cowans* involved a threat to institutional security. In the instant case, the beatings complained of by the prisoners occurred *after* [emphasis in the original] any threat to institutional security had been quelled. Therefore *Cowans* does not control" Slip op. at p. 12.

For the panel to hold that institutional security is implicated when an inmate behind a solid, locked door refuses to allow the small food service slot door to be closed without force but is not implicated when inmates who participated in a riot, which resulted in the death of

a correctional officer and the wounding of several other officers, are separated and moved to housing units and/or institutions other than the housing unit where the riot occurred, is simply untenable. Not only will the lower courts be unable to determine in future cases when institutional security is at issue and when it is not, the panel's opinion is inconsistent with the recent holding of *Graham v. Connor,* 57 U.S.L.W. 4513. In *Graham,* the United States Supreme Court reversed a finding that a plaintiff subjected to excessive force by police officers must prove the four factors set out in *Johnson v. Glick,* 481 F.2d 1028 (2nd Cir.) *cert denied,* 414 U.S. 1033 (1973). The *Graham* court made clear excessive force cases have different standards depending on whether the claim is brought under the Fourth or Eighth Amendment. The court went on to hold that the Eighth Amendment's "less protective . . . standard", *Graham v. Connor,* 57 U.S.L.W. at 4517, as analyzed in *Whitley v. Albers,* 475 U.S. 312, 318-326, 106 S.Ct. 1078 (1986) applies to convicted felons. The *Whitley* court held:

> The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged. * * * where a prison security measure is undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and

> sadistically for the very purpose of causing harm.' "

Id. S.Ct. at 1084-1085.

In the instant case, the appellants took measures to resolve the disturbance. Initially, the action was to repel the inmate attack and then it was to remove the participants from the housing unit where the riot occurred. Clearly, the instructions to the jury in the instant case allowed a verdict for appellees without a finding that the force was actually applied maliciously and sadistically for the very purpose of causing harm – or failing that, that the appellees were subjected to the unnecessary and wanton infliction of pain and suffering.

The panel rendered an opinion inconsistent with the holdings in *Graham v. Connor, supra; Whitley v. Albers, supra; Cowans v. Wyrick, supra* and *Holloway v. Lockhart, supra,* and the appellants believe that the panel's holding should be reversed.

This Court should, consistent with the holding in *Wilson v. City of North Little Rock,* 801 F.2d 316 (8th Cir. 1986), in order to uphold a finding of liability against supervisory officials, require a finding that the supervisor directed the claimed violations, or had actual knowledge of the claimed violations and either affirmatively countenanced them or acquiesced in their commission.

In the instant case, four of the appellants against whom verdicts were returned, were supervisory officials on appeal. Appellants challenged the sufficiency of the evidence which would allow the submission against three of the officials. Appellants here concede that the evidence was sufficient to allow a submission against appellants

Halley and Dennis. However, the evidence is blatently insufficient under the holding in *Wilson v. City of North Little Rock, supra* to allow a submission against appellants Riley and Armontrout. Appellants maintain that the panel overlooked material matters of fact, drawing unsupported conclusions, or the panel implicitly expanded the standard in *Wilson* by including the instant facts within the *Wilson* holding. In either case, the holding should be reviewed by the court.

The panel recited the evidence against appellant Riley. Riley, Assistant Corrections Director, came to the Missouri Training Center for Men the night of the riot. He went to the housing unit where the riot took place. Riley saw inmate Roberts (the panel incorrectly labeled Roberts a plaintiff at Slip. op. p. 5) placed on the laundry table. Riley said he "saw no reprisals taking place" and he left after 20-30 minutes. When Riley was in the housing unit, a maintenance engineer, Alan Personette asked Riley "Got a pair of blinders?" The panel put that evidence with Appellee McWorthy's testimony that he was on the laundry table next to inmate Roberts and that he and Roberts were beaten by appellant Williams and wrote:

> "The above testimony places Riley in clear view of the beatings taking place in the rotunda. Riley took no action; he did not give orders to stop the beatings or attempt to calm the situation. Riley's conduct is an example of deliberate indifference to plaintiffs' constitutional rights. The beatings at least of Roberts and McWorthy took place within Riley's view, but he did nothing to stop the beatings."

The difficulty with this conclusion is that it is not based on any evidence. Appellees did not testify that Riley was

present when they were allegedly beaten. Personnette did not testify that he saw any beatings, or even that there were any beatings for him to not want to see. Even if Personnette's ambiguous question "Got a pair of blinders?" can be read to mean he assumed that there were beatings that should not be viewed, Riley's own examination of the situation and testimony that he saw no reprisals does not allow the speculative conclusion reached by the panel that Riley was in clear view of the beatings. The medical evidence does not support a conclusion that appellees injuries were such that if Riley was in the housing unit when the appellees were at the laundry table he would have been able to observe that appellees had been beaten. Riley could have been in the housing unit when no beatings, if indeed any occurred, took place. There is no evidence that Riley ordered the appellees to be beaten and Personnette's comment standing alone does not allow a conclusion that Riley had actual knowledge of the beating and countenanced them or acquiesced in them. At most, appellees proved a claim of negligence for Riley's failure to discover claimed violations and negligence is not enough to allow a submission against Riley.

Finally, the panel reviewed the evidence against appellant Armontrout. Armontrout was the Associate Warden of the Missouri State Penitentiary (MSP) and commanded the MSP emergency squad sent to the Missouri Training Center for Men. The panel writes "The evidence establishes that Armontrout knew or should have known that flaring tempers among the prison guards would lead them to retaliate against the inmates." The panel does not explain what evidence allows that

conclusion. The remaining "evidence" against Armontrout is that according to appellee Bolin, Armontrout made a reference to appellant Borghardt's "getting out his black gloves" which Bolin took to be a reference to a whipping from Borghardt (the panel incorrectly refers to a whipping from Armontrout slip. op. p. 6). Further, Armontrout returned to MSP in a separate vehicle and did not ride on the bus with the inmates involved in the riot. The panel draws what are termed inferences from this evidence. First, "that Armontrout took no steps to avoid the possibility of retaliatory punishment." Second, "that Armontrout knew there would be trouble on the inmate bus and did nothing to prevent it and third, "Armontrout was available to exercise direct control over the guards on the inmate bus." (Slip. op. pp. 6-7). Appellants maintain that the evidence against Armontrout is so slight the panel's inferences were more on the order of speculation.

Appellees did not testify that Appellant Borghardt struck them. If Armontrout made the statement about Borghardt's black gloves, and further if that statement means Borghardt was likely to "whip" appellee Bolin, the fact that Bolin did not testify he was indeed whipped by Bolin allows a more reasonable inference that Armontrout prevented Borghardt from using force on Bolin. If Borghardt did not use his supervisory authority to stop retaliatory punishment, that does not permit a submission against Armontrout. Armontrout's failure to ride the inmate bus, when there was a supervisor on the bus and the fact that Armontrout's vehicle followed the inmate bus does not allow a conclusion that Armontrout knew of the claimed violations and acquiesced in them as is

required by *Wilson, supra* at 322 to allow a submission against Armontrout. The panel, in concluding that Armontrout acted with deliberate indifference to the plaintiff's rights, gives credence to prejudiced assumptions, unsupported by the evidence, that given the opportunity, guards beat inmates and supervisors know that.

Appellants maintain that in allowing the submissions against appellants Riley and Armontrout to stand, the panel either overlooked material matters of fact or implicitly expanded the holding of *Wilson* by concluding the facts in the instant cause fit within *Wilson*.

Conclusion

Appellants urge this Court to rehear this case en banc or alternatively grant a rehearing by the panel for the reasons set out in this petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 8th day of June, 1989, to:

James Riner
P. O. Box 1496
Jefferson City, MO
65102-1496

/s/ Kelly Mescher
KELLY MESCHER

INSTRUCTION NO. 11

The Eighth Amendment to the United States Constitution provides that no cruel and unusual punishment may be inflicted. This protection against cruel and unusual punishment prohibits assaults without justification on prison inmates by corrections officers. In order for a corrections officer's use of force against any inmate to constitute cruel and unusual punishment, it must involve the unnecessary and wanton infliction of pain. To be "wanton," the official must have intended to harm the inmate.

"Pain" means more than momentary discomfort; the defendant's action must have resulted in either pain or injury. To be "unnecessary" or "excessive," the force used must have been more than appeared reasonably necessary at the time of the use of the force to maintain or restore discipline.

The management of prison inmates by corrections officers may require and justify the occasional use of a degree of intentional force. Not every push or shove violates an inmate's constitutional rights. In determining whether force used is unnecessary or excessive, the jury must consider such factors as the need for the application of force, the relationship between the need and the amount of force used, the extent of injury inflicted, and whether force was applied in a reasonable effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

INSTRUCTION NO. 12

Your verdict must be for Plaintiff Bolin and against Defendant Dennis, on Plaintiff's claim regarding the use of excessive force, if you believe:

First, Defendant Dennis intentionally hit, kicked or beat Plaintiff Bolin, and

Second, the use of such force was excessive under the circumstances as that phrase is explained in Instruction No. 11.

INSTRUCTION NO. 13

Your verdict must be for Plaintiff Bolin and against Defendant Dennis, on Plaintiff's claim regarding the failure of Defendant Dennis to protect Plaintiff Bolin and to supervise his subordinates, if you believe:

First, that Plaintiff Bolin was intentionally kicked, beaten or hit by an employee of the Missouri Department of Corrections, and

Second, the use of such force was excessive under the circumstances as that phrase is explained in Instruction No. 11, and

Third, that Defendant Dennis had a duty to protect Plaintiff Bolin and to properly supervise the individual who hit, kicked, or beat Plaintiff Bolin, and

Fourth, that Defendant Dennis knew or was deliberately indifferent to Plaintiff Bolin's need to be protected from such injuries, and

Fifth, that Defendant Dennis with deliberate indifference to or conscious disregard for the rights of Plaintiff Bolin failed or refused to properly supervise his subordinates to prevent such injuries.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1762

John Bolin, Douglas McWorthy, Melvin Steagal and Billy Wilson,

Appellees,

v.

Dr. Lee Roy Black, David W. Blackwell, R. Dale Riley, Bill Armontrout, Jimmie M. Jones, Willie J. Dennis, Earl Bays, Donald Beckley, Robert E. Borghardt, Richard Childs, Clarence A. Durham, Denver F. Halley, Officer Adams, William N. Arney, James A. Eberle, Thomas C. Davis, Harry L. Lloyd, Robert M. Malone, Michael L. Plemmons, Clarence L. Williams, Robert S. Wilson and James V. Rockenfield,

Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: January 9, 1989

Filed: May 26, 1989

Before JOHN R. GIBSON and MAGILL, Circuit Judges, and WATERS,* Chief District Judge.

MAGILL, Circuit Judge.

This appeal follows the jury trial of a civil rights action under 42 U.S.C. § 1983. Plaintiffs, prisoners incarcerated at the Missouri Training Center for Men (MTCM) in Moberly, Missouri, sued MTCM and Missouri State Penitentiary (MSP) officials, claiming that beatings by prison guards following a prison riot violated plaintiffs' constitutional rights. After a five-day trial, the jury returned a verdict for plaintiffs, awarding both compensatory and punitive damages. We affirm the district court[1] in all respects.

I.

On July 3, 1983, thirty to thirty-five inmates at the MTCM forced their way into the rotunda of Housing Unit #2 (HU#2) where they fought correctional officers who were attempting to remove an intoxicated prisoner from Wing B of HU#2 to the rotunda. During the fight one

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*The HONORABLE H. FRANKLIN WATERS, Chief Judge, United States District Court for the Western District of Arkansas, sitting by designation.

[1] The Honorable William A. Knox, United States Magistrate for the Western District of Missouri, presided, pursuant to consent of the parties. *See* 28 U.S.C. § 636(c).

officer was fatally stabbed and several other officers were wounded. When the disturbance quieted down, prison officials deadlocked the inmates in their rooms, administered medical treatment to those prisoners requiring it, and searched the rooms for weapons and intoxicating substances. The following day, correctional officers bused prisoners allegedly involved in the incident to the state penitentiary.

The constitutional violations complained of in plaintiffs' civil rights suit did not occur during the disturbance, but after prison officials had restored order to the facility. According to plaintiffs' testimony, the assaults occurred after the disturbance had subsided and the inmates had been returned to and locked down in their cells. Plaintiffs testified that they were removed from their cells by two or more officers, thrown to the floor, kicked and hit, handcuffed and taken to the rotunda. In the rotunda, prison officials forced plaintiffs to lie on their stomachs over a laundry table while officers kicked them and beat them with night sticks, fists and slap jacks. Prison officials then removed plaintiffs from the rotunda. Plaintiff McWorthy was taken to another location in HU#2 and was beaten on the way; plaintiffs Bolin and Wilson were taken to MTCM's medical facility, where they were subjected to further beatings by officers. The next morning, plaintiffs and other inmates were transported by bus from MTCM to MSP, a distance of sixty miles. During that trip, prison guards inflicted further injury on the inmates.

Plaintiffs filed a complaint against R. Dale Riley, Assistant Director of the Division of Adult Institutions, Bill Armontrout, Associate Warden of MSP, and various

supervisory and nonsupervisory personnel at both MTCM and MSP.[2] The jury found in favor of plaintiffs, assessed damages against each defendant and set limits on the supervisory defendants' joint and several liability. The district court affirmed the various damage awards, except for the damages awarded plaintiff Bolin against defendant Halley.[3] Judgment was entered accordingly, reflecting the following total damage amounts for each plaintiff: Bolin $9,500 actual and $56,000 punitive; McWorthy – $14,500 actual and $74,000 punitive; Wilson – $14,000 actual and $73,000 punitive.

The prison officials appeal from the judgment and from the district court's order denying their motions for judgment n.o.v., or in the alternative, new trial, or remittitur.

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[2] The district court found the following chain of command at MTCM on the night in question: defendant R. Dale Riley had supervisory authority over all employees and activities when he was present; defendant Willie J. Dennis, Chief Custody Officer, who was at MTCM the night in question although he was not scheduled for duty, had supervisory authority when he was present over defendant Denver Halley, the Senior Officer in Charge; and the other defendant officers at MTCM – William Arney, Clarence Williams and Robert Wilson – were essentially of equal rank. With respect to the bus trip from Moberly to Jefferson City, Missouri, the district court found the following chain of command: defendant Bill Armontrout was overall supervisor; defendant Robert Borghardt was second in command; and all other defendant officers on the bus – James Eberle, Thomas Davis, Robert Malone and Michael Plemmons – were of equal rank.

[3] The court reduced the compensatory damage award for failure to protect from $5,000 to $1,000 and likewise reduced the punitive damage award from $15,000 to $7,000.

II.

Defendants raise six grounds for error:

(1) the district court erred in submitting claims against three supervisory officials because the evidence did not demonstrate their personal involvement in or tacit authorization of the excessive force;

(2) the district court erred with respect to the jury instruction on supervisor liability because the instruction failed to require a finding that a supervisor either knew of and authorized his subordinates' acts or failed to take remedial steps to prevent the acts;

(3) the district court's instructions erroneously placed the burden of proof on the prison officials;

(4) the district court erred in giving an excessive force instruction that did not require the jury to find the intentional infliction of unnecessary and wanton pain and suffering and damage to plaintiffs;

(5) the district court erred when it failed to conduct an evidentiary hearing regarding one juror's failure to disclose essential information during voir dire; and

(6) the district court erred in not reducing the punitive damage awards.

We address each of appellants' arguments.

A. Sufficiency of Evidence

Plaintiffs predicate their claims against Riley, Armontrout and Halley on the failure of those defendants to protect plaintiffs from the excessive use of force by

other corrections officers. Appellants maintain that the district court allowed submission and recovery of punitive damages against Riley, Armontrout and Halley on evidence supporting nothing more than a respondeat superior theory. Plaintiffs disagree.

It is well settled that the doctrine of respondeat superior is insufficient to allow recovery in a § 1983 action. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); *Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982). This court has held that a cause of action predicated on a supervisor's failure to supervise or control his subordinates may be maintained "only if [a defendant] demonstrated deliberate indifference or tacit authorization of the offensive acts." *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986). We must analyze separately the case against each of the three defendants to determine the sufficiency of the evidence.

Defendant Riley was the Assistant Corrections Director at MTCM at the time of the riot. He came to MTCM at about 10:30 p.m. on July 3, after he learned of the disturbance. According to his testimony, he went to HU#2 to check out the situation and stayed there observing for twenty to thirty minutes, during which time he "saw no reprisals taking place." Riley admitted, however, that he saw plaintiff Roberts placed on the laundry table. Plaintiff McWorthy testified that he was placed on the laundry table next to Roberts and that both he and Roberts were severely beaten by defendant Williams. Furthermore, each inmate who testified described being taken to the laundry table in handcuffs, laid across the table and then beaten by the corrections officers. Alan Personette, a maintenance engineer at MTCM, was in the rotunda with

Riley. Personette testified that he did not see the guards beating the inmates because he "didn't want to see it." While Riley was in the rotunda, Personette asked him, "Got a pair of blinders?" implying that they should ignore the beatings that were taking place.

The above testimony places Riley in clear view of the beatings taking place in the rotunda. Riley took no action; he did not give orders to stop the beatings or attempt to calm the situation. Riley's conduct is an example of deliberate indifference to plaintiffs' constitutional rights. The beatings at least of Roberts and McWorthy took place within Riley's view, but he did nothing to stop the beatings. His action reflects tacit approval of the beatings as well as authorization to continue physical abuse of the plaintiffs.

Defendant Armontrout was the Associate Warden of MSP and commanded the emergency squad summoned to Moberly. The evidence establishes that Armontrout knew or should have known that flaring tempers among the prison guards would lead them to retaliate against the inmates. During an interview with plaintiff Bolin, Armontrout made a reference to the possibility of retaliatory punishment by a reference to defendant Borghardt "getting out his black gloves," alluding to Bolin getting a whipping from Armontrout. Armontrout took no steps to avoid the possibility of retaliatory punishment. On direct examination by plaintiffs' counsel, Armontrout stated that he chose not to ride on the inmate bus and supervise it despite his knowledge that a guard had been killed and that the entire staff – including the officers riding with the inmates – was upset. This evidence supports an inference that Armontrout knew there could be trouble on the

inmate bus and did nothing to prevent it. Armontrout also testified that he and others followed the inmate bus to assist the guards on that bus in the event of a disturbance. These facts give rise to an inference that Armontrout was available to exercise direct control over the guards on the inmate bus. As in the case of Riley, the evidence adduced at trial supports the conclusion that Armontrout acted with, at minimum, deliberate indifference to the plaintiffs' constitutional rights.

At the time of the laundry table beatings, Captain Halley was either the ranking officer at the institution or in control of HU#2. Plaintiff Bolin testified that Halley was present when guards removed Bolin from his cell, pushed him to the ground and beat him up. Plaintiff McWorthy testified that either Halley or Dennis was present when he was removed from his cell. Halley himself testified that he saw five or six inmates brought to the rotunda and laid on the laundry table, and that he "gave the order that I didn't want anybody killed." His later statement to Highway Patrol investigators that "I've seen a lot more ass kicking than was done in there" implies that he knew of the beatings. In addition, Personette testified that he observed Halley strike an inmate with a baseball bat as the inmate (not one of the plaintiffs) was brought into the rotunda.

The above testimony is sufficient to support the jury's finding that Halley actively participated in violating Bolin's and McWorthy's constitutional rights by inflicting physical injury. His direct abuse of some inmates demonstrated his deliberate disregard for plaintiffs' constitutional rights and, by virtue of his supervisory authority, invited other corrections officers to

follow his example. His conduct rose at least to the level of "tacit authorization."

Based on our review of the record, we find the evidence sufficient to allow submission to the jury of plaintiffs' claims against Riley, Armontrout and Halley, and to support the jury's verdict against each of those defendants.

B. Jury Instructions

1. Supervisory Liability

Appellants argue that the jury instructions were deficient because they did not require the jury to find that a supervisor knew of and authorized a subordinate's inappropriate acts or that the supervisor failed to take steps to prevent such conduct. The district court gave the following verdict directing instruction against all the supervisors:

> Your verdict must be for Plaintiff ___ and against Defendant ___, on Plaintiff's claim regarding the failure of Defendant ___ to protect Plaintiff ___ and to supervise his subordinates, if you believe:
>
> First, that Plaintiff ___ was intentionally kicked, beaten or hit by an employee of the Missouri Department of Corrections, and
>
> Second, the use of such force was excessive under the circumstances as that phrase is explained in Instruction No. *11*, and
>
> Third, that Defendant ___ had a duty to protect Plaintiff ___ and to properly supervise the individual who hit, kicked, or beat Plaintiff ___, and

> Fourth, that Defendant ___ knew or was deliberately indifferent to Plaintiff ___ need to be protected from such injuries, and
>
> Fifth, that Defendant ___ with deliberate indifference to or conscious disregard for the rights of Plaintiff ___ failed or refused to properly supervise his subordinates to prevent such injuries. (Appellants' Appendix p. 33).

Appellants attack this instruction on four grounds: (1) it did not require plaintiffs to prove their case by a preponderance of the evidence; (2) it did not require a finding that the kicking, hitting and beating caused "unnecessary and wanton pain and suffering;" (3) it did not require a finding that the prison officials knew of the acts and, knowing of the acts, tacitly authorized them or failed to take remedial steps to prevent them; and (4) it did not require a finding that the supervisor's conduct actually injured plaintiffs.

The rule of this circuit is clear: jury instructions are sufficient if they state the governing law fairly when read as a whole, and considering each instruction in light of the whole. After examining the jury instructions in their entirety, we find appellants' arguments to be without merit.

With respect to the first allegation, Instruction No. 7 instructed the jury as to which party had the burden of proof and how that burden could be met. The burden of proof instruction need not be repeated in each verdict director. Similarly, Instruction No. 11 defines the excessive force required by the verdict director in terms of "unnecessary and wanton infliction of pain." In effect, Instruction No. 11 did require a finding that the officers'

use of force caused unnecessary and wanton pain and suffering. Appellants' third criticism ignores the plain language of the verdict director requiring the jury to find that the defendant "knew or was deliberately indifferent to [plaintiffs'] need to be protected," and thereafter "with deliberate indifference or conscious disregard for [plaintiffs' rights] failed or refused to properly supervise his subordinates to prevent such injuries." Appellants' reading of the instruction is clearly incorrect. Finally, we find no merit in appellants' fourth argument. Instruction No. 44 limited plaintiffs to compensation for injury sustained "as a direct result of the conduct of that defendant against whom you find * * * ." This forbid the jury from awarding compensatory damages unless they believed a plaintiff suffered damages as the direct result of a given defendant's conduct.

We also note that appellants failed to object to the verdict directing instructions regarding supervisory liability. This court has steadfastly held that errors in instructions are waived if not properly objected to at trial, unless the instructions constituted plain error. *See Bedeman v. Mayo Foundation*, 804 F.2d 435, 438 (8th Cir. 1986). We find no error here.

2. Burden of Proof

Appellants argue that one of the general instructions given by the trial judge improperly placed a burden of proof on the corrections officials. The challenged instruction reads, in part:

> Your verdict depends upon whether or not you believe a certain set of facts submitted to

> you. *The burden of causing you to believe certain facts is upon the party whose claim or defense depends upon those facts.*
>
> The party who has the burden of proving certain facts must prove they are more likely true than not true. If the evidence does not persuade you that a fact is more likely true than not true, then you must decide the issues dependent on that fact against the party who has the burden of proof on that fact.

Instruction No. 7 (emphasis added). Appellants maintain that the district court improperly cast a burden of proof on them by refusing to either modify the instruction, delete the reference to defense, or give an alternative instruction proffered by appellants. After reviewing the instructions in their entirety, we disagree.

Instruction No. 7's mention of "defense" is the only such reference in the entire set of jury instructions. The instructions make no other reference to defense or otherwise indicate that defendants had any burden whatsoever. Rather, the instructions specifically require that the jury find that plaintiffs had proved the truth of facts set out in the verdict directors before returning a verdict in favor of plaintiffs. We find that the instructions, taken as a whole, do not tend to impose any burden of proof on defendants.

3. Verdict Directing Instructions

Defendants challenge the instructions given against those defendants accused of using excessive force, claiming that the instructions are in error because they did not expressly require the jury to find (1) that the force

applied inflicted unnecessary and wanton pain and suffering and (2) that the plaintiff was damaged.

It is true that the verdict directing instructions did not expressly require a finding that the force used by the corrections officials inflicted unnecessary and wanton pain and suffering. Each verdict director, however, referred the jury to Instruction No. 11's definition of cruel and unusual punishment, which stated that the force used must involve the unnecessary and wanton infliction of pain. The two instructions taken together correctly advised the jury of the standard to apply with respect to plaintiffs' claims.

At argument, defendants relied on a recent decision by this court for their argument that the instructions should have required specific findings that the force used was either malicious for the purpose of harm or unnecessary and wanton, and that the force actually damaged plaintiffs. *See Cowans v. Wyrick*, 862 F.2d 697, 699-700 (8th Cir. 1989). Cowans was injured when a prison guard slammed a food slot door shut on his hand. A jury found that the guard had inflicted cruel and unusual punishment on Cowans, but did not assess any damages against the guard. The district court awarded Cowans nominal damages based on the jury verdict. This court reversed, holding, under *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986), that the guard's action was a reasonable measure undertaken to resolve a disturbance which posed a significant security threat. *Cowans* differs from the current case, however, in that *Cowans* involved a threat to institutional security. In the instant case, the beatings complained of by the prisoners occurred *after* any threat to institutional

security had been quelled. Therefore *Cowans* does not control.

We also find without merit the objection based on a lack of finding with respect to damages. Although the verdict director did not require an express finding that plaintiffs were damaged, Instruction No. 44 instructed the jury on how to determine the amount of compensatory, or actual, damages sustained by plaintiffs. The jury awarded each plaintiff compensatory damages pursuant to Instruction No. 44. Defendants never objected to this instruction, nor do they contend it was erroneous. Furthermore, the constitutional violation may be vindicated by the award of nominal damages even when no actual damages are proven. *Tatum v. Houser*, 642 F.2d 253, 254-55 (8th Cir. 1981). Because proof of actual damages is unnecessary to establish a constitutional violation, it follows that damages need not be an element to be proved in the verdict director.

C. Juror Misconduct

During voir dire in the instant case, the presiding magistrate asked the prospective jurors:

> Do any of you have family members or close friends or yourselves who have been or are now, and I know none of you are now, incarcerated, any of you have got family members or friends who are now incarcerated?

In response, juror Barber stated that her brother was "serving time in Moberly" for violating parole. None of the other jurors responded to the question. Juror Barber

was removed for cause due to her testimony that information she received from her brother would lead her to believe one side was more entitled to relief than the other. After the jury returned its verdict, appellants discovered that juror Kramer had not disclosed during voir dire that her thirty-five-year-old son was on probation at the time. Appellants argued juror misconduct in their motion for judgment n.o.v. or, alternatively, for new trial or remittitur. The district court found that the verdict was in no way prejudiced by juror misconduct. Appellants now maintain that the court erred in making such a determination without benefit of an evidentiary hearing.

After reviewing the record, we find no error. Juror Kramer responded to the question asked in a responsive and complete manner by remaining silent. The question asked whether she or any of her family had been *incarcerated*. "Incarcerated" is commonly understood to mean "in prison," and juror Kramer's son was never incarcerated. Because juror Kramer responded truthfully to the question asked, we find no deliberate concealment on her part. *See Robinson v. Monsanto Company*, 758 F.2d 331, 334-35 (8th Cir. 1985). Therefore, defendants failed to make a prima facie case of misconduct and the district court was not obligated to hold an evidentiary hearing *sua sponte*.

D. Reduction of Damages

The district court affirmed all compensatory and punitive damage awards except the award against

defendant Halley for his failure to protect plaintiff Bolin.[4] The jury found Halley directly liable to plaintiff Bolin for $2,500 based on Halley's actual participation in the beatings. The jury set the limit of Halley's joint and several liability for failure to protect at $5,000 and set punitive damages at $15,000, twice the amount of Halley's potential total liability. The magistrate reduced the compensatory award to $1,000 because Halley is only potentially liable for injuries inflicted by Williams, whom Halley supervised, and the jury found only $1,000 actual damages against Williams. The judge also reduced punitive damages against Halley to $7,000, twice Halley's revised potential liability.

We find no basis for reduction of the amount of damages awarded to plaintiffs. The punitive damages awarded in this case range from $2,000 to $10,000. Such amounts are not excessive, given the constitutional violations found by the jury.

Accordingly, we affirm the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[4] Appellants allege that the district court reduced actual damages by removing actual damage awards against the supervisors as duplicative. We agree with plaintiffs, however, that what appellants now claim to be a reduction in compensatory damages was no more than a mathematical computation of the damages due under the instructions and verdict forms given to the jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
MISSOURI CENTRAL DIVISION

JOHN BOLIN, et al.,	)	
	)	
Plaintiffs,	)	No. 86-4448-CV-C-5
v.	)	(Filed April 14, 1988)
DR. LEE ROY BLACK, et al.,	)	
	)	
Defendants.	)	

ORDER

Trial in the above-styled cause commenced on August 10 and concluded on August 14, 1987. Directed verdicts were granted in favor of numerous defendants and jury verdicts were returned in favor of all three plaintiffs on the claims which were submitted to the jury. On August 14, 1987, defendants filed a motion for judgment notwithstanding the verdict or alternatively, for new trial or alternatively, for remittur. Plaintiffs filed their opposition thereto on September 23, 1987.

Each of the three plaintiffs complained that certain defendants, all employees of the Missouri Department of Corrections and Human Resources, assaulted plaintiffs while they were at Missouri Training Center for Men (MTCM) at Moberly, Missouri; that other defendants assaulted plaintiffs while they were being transported on the bus from MTCM to Missouri State Penitentiary at Jefferson City, Missouri; and that other defendants failed to prevent the assaults. The assaults occurred after a disturbance at Missouri Training Center for Men had subsided and the inmates had been returned to and locked down in their cells.

The chain of command at MTCM the night in question was as follows: Defendant R. Dale Riley had supervisory authority over all employees and activities when he was present; defendant Willie J. Dennis, Chief Custody Officer, although not scheduled for duty, was at MTCM the night in question and when he was present, had supervisory authority over defendant Denver Halley; defendant Halley was the Senior Officer in Charge; and the other defendant officers at MTCM, William Arney, Clarence Williams and Robert Wilson, were essentially of equal rank.

The chain of command overseeing the bus trip from Moberly to Jefferson City, Missouri, on the night in question was as follows: defendant Bill Armontrout was overall supervisor; his second in command was defendant Robert Borghardt; and all other defendant officers on the bus, consisting of James Eberle, Thomas Davis, Robert Malone and Michael Plemmons, were of equal rank.

By special interrogatory regarding plaintiffs' claims against the supervisory personnel, defendants Dennis, Halley, Riley, Armontrout and Borghardt, the jury was asked whether the amounts awarded include damages for injuries inflicted by unidentified corrections personnel. They were directed to answer "yes" or "no" and to state the amount. In each case, the jury answered "yes" and set the amount of $500. The special interrogatory was intended to clarify the issue of damages with respect to the joint and several liability of supervisory personnel; however, the interrogatory does not clarify matters and the answers should and will be completely disregarded.

Three verdict forms were used, one for each plaintiff. Verdict "A" covers plaintiff Bolin's claims; Verdict "B" covers plaintiff McWorthy's claims; and Verdict "C" covers plaintiff Wilson's claims. Because of the complexity of the case and the number of claims, accurately summarizing the damages on each verdict will necessitate an analysis of each claim individually.

Plaintiff Bolin's Claims.

Instruction No. 12 allowed the jury to find for plaintiff Bolin and against defendant Dennis on plaintiff's claim that defendant Dennis used excessive force against plaintiff at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Dennis and assessed actual damages in the amount of $1,000. This award is supported by the evidence and is affirmed.

Instruction No. 13 allowed the jury to find for plaintiff Bolin and against defendant Dennis on plaintiff's claim that defendant Dennis failed to supervise his subordinates at MTCM to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Dennis and set the limit of his joint and several liability for actual damages in the amount of $2,500, which is not listed in total actual damages because it is duplicative. Thus, defendant Dennis is jointly and severally liable for an amount not to exceed $2,500 for his failure to supervise properly defendants Halley and Williams. The jury also awarded punitive damages against defendant Dennis in the amount of $7,000, which is twice the amount of the total award of

actual damages against defendant Dennis. These awards are supported by the evidence and are affirmed.

Instruction No. 14 allowed the jury to find for plaintiff Bolin and against defendant Halley on plaintiff's claim that defendant Halley used excessive force against plaintiff at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Halley and assessed actual damages in the amount of $2,500 and punitive damages in the amount of $5,000. This award is supported by the evidence and is affirmed.

Instruction No. 15 allowed the jury to find for plaintiff Bolin and against defendant Halley on plaintiff's claim that defendant Halley failed to prevent the use of excessive force against plaintiff by others at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Halley and assessed actual damages in the amount of $5,000 as the limit of defendant Halley's liability for injuries inflicted upon plaintiff by other defendants. This amount is not listed in the total actual damages because it is duplicative. However, because defendant Halley is jointly and severally liable with only defendant Williams (the only other person found to have assaulted plaintiff Bolin at MTCM), whom defendant Halley supervised, and the award of actual damages against defendant Williams is $1,000, the limit of defendant Halley's joint and several liability under Instruction No. 15 is $1,000, not $5,000. In that regard, remittur is awarded to reduce the total amount of defendant Halley's joint and several liability under Instruction No. 15 to $1,000. The jury awarded punitive damages in the amount of $15,000 against defendant Halley, an amount which should be adjusted to reflect the remittur

just granted. In all other awards of punitive damages, the jury assessed such damages at twice the amount of actual damages awarded; thus, the total award of punitive damages to plaintiff against defendant Halley is hereby reduced to $7,000 (which is double the amount of actual damages of $2,500 inflicted by defendant Halley and $1,000 inflicted by his subordinates).

Instruction No. 16 allowed the jury to find for plaintiff Bolin and against defendant Williams on plaintiff's claim that defendant Williams used excessive force against plaintiff at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Williams and assessed actual damages in the amount of $1,000 and punitive damages in the amount of $2,000. These awards are supported by the evidence and are affirmed.

Instruction No. 17 allowed the jury to find for plaintiff Bolin and against defendant Eberle on plaintiff's claim that defendant Eberle used excessive force against plaintiff while being transported on the bus from Moberly to Jefferson City, Missouri. The jury returned a verdict on this claim in favor of plaintiff and against defendant Eberle and assessed actual damages in the amount of $2,500 and punitive damages in the amount of $5,000. These awards are supported by the evidence and are affirmed.

Instruction No. 18 allowed the jury to find for plaintiff Bolin and against defendant Malone on plaintiff's claim that defendant Malone used excessive force against plaintiff while being transported on the bus from Moberly to Jefferson City, Missouri. The jury returned a

verdict on this claim in favor of plaintiff and against defendant Malone and assessed actual damages in the amount of $2,500 and punitive damages in the amount of $5,000. These awards are supported by the evidence and are affirmed.

Instruction No. 19 allowed the jury to find for plaintiff Bolin and against defendant Riley on plaintiff's claim that defendant Riley failed to supervise his subordinates at MTCM to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Riley and set the limit of defendant Riley's joint and several liability at $5,000. This amount is not listed in the total actual damages because it is duplicative. Defendant Riley's liability is based upon his failure to supervise properly defendants Dennis, Halley and Williams. The jury also awarded punitive damages against defendant Riley in the amount of $10,000. This award is supported by the evidence and is affirmed.

Instruction No. 20 allowed the jury to find for plaintiff Bolin and against defendant Armontrout on plaintiff's claim that defendant Armontrout failed to supervise his subordinates on the bus to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Armontrout and set the limit of defendant Armontrout's joint and several liability at $5,000, which is not listed in the total actual damages because it is duplicative. Defendant Armontrout's liability is based upon his failure to supervise adequately defendants Eberle and Malone. The jury also awarded punitive damages against defendant

Armontrout in the amount of $10,000. This award is supported by the evidence and is affirmed.

Instruction No. 21 allowed the jury to find for plaintiff Bolin and against defendant Borghardt on plaintiff's claim that defendant Borghardt failed to supervise his subordinates on the bus to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Borghardt and set the limit of defendant Borghardt's joint and several liability at $5,000, which is not listed in the total actual damages because it is duplicative. Defendant Borghardt's liability is based upon his failure to supervise adequately defendants Eberle and Malone. The jury also awarded punitive damages against defendant Borghardt in the amount of $10,000. This award is supported by the evidence and is affirmed.

Accordingly, plaintiff Bolin is entitled to recover the following amounts from the following individuals:

(1) Defendant Dennis, $1,000 actual and $7,000 punitive damages;

(2) Defendant Halley, $2,500 actual and $7,000 punitive damages;

(3) Defendant Williams, $1,000 actual and $2,000 punitive damages;

(4) Defendant Eberle, $2,500 actual and $5,000 punitive damages;

(5) Defendant Malone, $2,500 actual and $5,000 punitive damages;

(6) Defendant Riley, $10,000 punitive damages;

(7) Defendant Armontrout, $10,000 punitive damages; and

(8) Defendant Borghardt, $10,000 punitive damages.

The other awards of damages specified are merely the limits of individuals' joint and several liability for injuries inflicted by others and should not be computed in determining the total amount of the award in favor of plaintiff Bolin.

Therefore, plaintiff Bolin's total award is $9,500 actual damages and $56,000 punitive damages.

Plaintiff McWorthy's Claims.

Instruction No. 22 allowed the jury to find for plaintiff McWorthy and against defendant Williams on plaintiff's claim that defendant Williams used excessive force against plaintiff at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Williams and assessed actual damages in the amount of $1,000 and punitive damages in the amount of $2,000. These awards are supported by the evidence and are affirmed.

Instruction No. 23 allowed the jury to find for plaintiff McWorthy and against defendant Wilson on plaintiff's claim that defendant Wilson used excessive force against plaintiff at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Wilson and assessed actual damages in the amount of $5,000 and punitive damages in the amount of $10,000. These awards are supported by the evidence and are affirmed.

Instruction No. 24 allowed the jury to find for plaintiff McWorthy and against defendant Eberle on plaintiff's claim that defendant Eberle used excessive force against plaintiff while being transported on the bus from Moberly to Jefferson City, Missouri. The jury returned a verdict on this claim in favor of plaintiff and against defendant Eberle and assessed actual damages in the amount of $2,500 and punitive damages in the amount of $5,000. These awards are supported by the evidence and are affirmed.

Instruction No. 25 allowed the jury to find for plaintiff McWorthy and against defendant Davis on plaintiff's claim that defendant Davis used excessive force against plaintiff while being transported on the bus from Moberly to Jefferson City, Missouri. The jury returned a verdict on this claim in favor of plaintiff and against defendant Davis and assessed actual damages in the amount of $2,500 and punitive damages in the amount of $5,000. These awards are supported by the evidence and are affirmed.

Instruction No. 26 allowed the jury to find for plaintiff McWorthy and against defendant Malone on plaintiff's claim that defendant Malone used excessive force against plaintiff while being transported on the bus from Moberly to Jefferson City, Missouri. The jury returned a verdict on this claim in favor of plaintiff and against defendant Malone and assessed actual damages in the amount of $2,500 and punitive damages in the amount of $5,000. These awards are supported by the evidence and are affirmed.

Instruction No. 27 allowed the jury to find for plaintiff McWorthy and against defendant Plemmons on

plaintiff's claim that defendant Plemmons used excessive force against plaintiff while being transported on the bus from Moberly to Jefferson City, Missouri. The jury returned a verdict on this claim in favor of plaintiff and against defendant Plemmons and assessed actual damages in the amount of $1,000 and punitive damages in the amount of $2,000. These awards are supported by the evidence and are affirmed.

Instruction No. 28 allowed the jury to find for plaintiff McWorthy and against defendant Dennis on plaintiff's claim that defendant Dennis failed to supervise his subordinates at MTCM to prevent the use of excessive force against plaintiff. The jury returned a verdict on that claim in favor of plaintiff and against defendant Dennis and set the limit of defendant Dennis' joint and several liability at $2,500, which is not listed in the total actual damages because it is duplicative. Defendant Dennis' liability is based upon his failure to supervise properly defendants Halley, Williams and Wilson. The jury also awarded punitive damages against defendant Dennis in the amount of $5,000. This award is supported by the evidence and is affirmed.

Instruction No. 29 allowed the jury to find for plaintiff McWorthy and against defendant Halley on plaintiff's claim that defendant Halley used excessive force against plaintiff at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Halley and assessed actual damages in the amount of $5,000 and punitive damages in the amount of $10,000. These awards are supported by the evidence and are affirmed.

Instruction No. 30 allowed the jury to find for plaintiff McWorthy and against defendant Riley on plaintiff's claim that defendant Riley failed to supervise his subordinates at MTCM to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Riley and set the limit of defendant Riley's joint and several liability at $5,000, which is not listed in the total actual damages because it is duplicative. Defendant Riley's liability is based upon his failure to supervise properly defendants Halley, Williams and Wilson. The jury also awarded punitive damages against defendant Riley in the amount of $10,000. This award is supported by the evidence and is affirmed.

Instruction No. 31 allowed the jury to find for plaintiff McWorthy and against defendant Armontrout on plaintiff's claim that defendant Armontrout failed to supervise his subordinates on the bus to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Armontrout and set the limit of defendant Armontrout's joint and several liability at $5,000, which is not listed in the total actual damages because it is duplicative. Defendant Armontrout's liability is based upon his failure to supervise adequately defendants Eberle, Davis, Malone and Plemmons. The jury also awarded punitive damages against defendant Armontrout in the amount of $10,000. This award is supported by the evidence and is affirmed.

Instruction No. 32 allowed the jury to find for plaintiff McWorthy and against defendant Borghardt on plaintiff's claim that defendant Borghardt failed to supervise

his subordinates on the bus to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Borghardt and set the limit of defendant Borghardt's joint and several liability at $5,000, which is not listed in the total actual damages because it is duplicative. Defendant Borghardt's liability is based upon his failure to supervise adequately defendants Eberle, Davis, Malone and Plemmons. The jury also awarded punitive damages against defendant Armontrout in the amount of $10,000. This award is supported by the evidence and is affirmed.

Accordingly, plaintiff McWorthy is entitled to recover from the individuals listed the following amounts:

(1) Defendant Williams, $1,000 actual and $2,000 punitive damages;

(2) Defendant Wilson, $5,000 actual and $10,000 punitive damages;

(3) Defendant Eberle, $2,500 actual and $5,000 punitive damages;

(4) Defendant Davis, $2,500 actual and $5,000 punitive damages;

(5) Defendant Malone, $2,500 actual and $5,000 punitive damages;

(6) Defendant Plemmons, $1,000 actual and $2,000 punitive damages;

(7) Defendant Dennis, $5,000 punitive damages;

(8) Defendant Halley, $10,000 punitive damages;

(9) Defendant Riley, $10,000 punitive damages;

(10) Defendant Armontrout, $10,000 punitive damages; and

(11) Defendant Borghardt, $10,000 punitive damages.

The court notes that the awards of actual damages against defendants Dennis, Halley, Riley, Armontrout and Borghardt are not separate amounts which might be recovered, but merely an assessment of the maximum joint and several liability of each of those individuals for the conduct of their subordinates.

Therefore, plaintiff McWorthy's total award is $14,500 actual damages and $74,000 punitive damages.

Plaintiff Wilson's Claims.

Instruction No. 33 allowed the jury to find for plaintiff Wilson and against defendant Arney on plaintiff's claim that defendant Arney used excessive force against plaintiff at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Arney and assessed actual damages in the amount of $2,000 and punitive damages in the amount of $4,000. These awards are supported by the evidence and are affirmed.

Instruction No. 34 allowed the jury to find for plaintiff Wilson and against defendant Williams on plaintiff's claim that defendant Williams used excessive force against plaintiff at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Williams and assessed actual damages in the amount of $1,000 and punitive damages in the amount of $2,000.

These awards are supported by the evidence and are affirmed.

Instruction No. 35 allowed the jury to find for plaintiff Wilson and Against defendant Wilson on plaintiff's claim that defendant Wilson used excessive force against plaintiff at MTCM. The jury returned a verdict on this claim in favor of plaintiff and against defendant Wilson and assessed actual damages in the amount of $5,000 and punitive damages in the amount of $10,000. These awards are supported by the evidence and are affirmed.

Instruction No. 36 allowed the jury to find for plaintiff Wilson and against defendant Davis on plaintiff's claim that defendant Davis used excessive force against plaintiff while being transported on the bus from Moberly to Jefferson City, Missouri. The jury returned a verdict on this claim in favor of plaintiff and against defendant Davis and assessed actual damages in the amount of $2,500 and punitive damages in the amount of $5,000. These awards are supported by the evidence and are affirmed.

Instruction No. 37 allowed the jury to find for plaintiff Wilson and against defendant Malone on plaintiff's claim that defendant Malone used excessive force against plaintiff while being transported on the bus from Moberly to Jefferson City, Missouri. The jury returned a verdict on this claim in favor of plaintiff and against defendant Malone and assessed actual damages in the amount of $2,500 and punitive damages in the amount of $5,000. These awards are supported by the evidence and are affirmed.

Instruction No. 38 allowed the jury to find for plaintiff Wilson and against defendant Plemmons on plaintiff's claim that defendant Plemmons used excessive force against plaintiff while being transported on the bus from Moberly to Jefferson City, Missouri. The jury returned a verdict on this claim in favor of plaintiff and against defendant Plemmons and assessed actual damages in the amount of $1,000 and punitive damages in the amount of $2,000. These awards are supported by the evidence and are affirmed.

Instruction No. 39 allowed the jury to find for plaintiff Wilson and against defendant Dennis on plaintiff's claim that defendant Dennis failed to supervise his subordinates at MTCM to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Dennis and set the limit of defendant Dennis' joint and several liability at $2,500, which is not listed in the total actual damages because it is duplicative. Defendant Dennis' liability is based upon his failure to supervise properly defendants Arney, Williams and Wilson. The jury also awarded punitive damages against defendant Dennis in the amount of $5,000. These awards by the jury are supported by the evidence and are affirmed.

Instruction No. 40 allowed the jury to find for plaintiff Wilson and against defendant Halley on plaintiff's claim that defendant Halley failed to supervise his subordinates at MTCM to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Halley and set the limit of defendant Halley's joint and several liability at $5,000, which is not listed in the total actual damages

because it is duplicative. This liability of defendant Halley is based upon his failure to supervise properly defendants Arney, Williams and Wilson. The jury also awarded punitive damages against defendant Halley in the amount of $10,000. This award is supported by the evidence and is affirmed.

Instruction No. 41 allowed the jury to find for plaintiff Wilson and against defendant Riley on plaintiff's claim that defendant Riley failed to supervise his subordinates at MTCM to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Riley and set the limit of defendant Riley's joint and several liability at $5,000, which is not listed in the total actual damages because it is duplicative. Defendant Riley's liability is based upon his failure to supervise properly defendants Arney, Williams and Wilson. The jury also awarded punitive damages against defendant Riley in the amount of $10,000. This award is supported by the evidence and is affirmed.

Instruction No. 42 allowed the jury to find for plaintiff Wilson and against defendant Armontrout on plaintiff's claim that defendant Armontrout failed to supervise his subordinates on the bus to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Armontrout and set the limit of his joint and several liability at $5,000, which is not listed in the total actual damages because it is duplicative. Defendant Armontrout's liability is based upon his failure to supervise adequately defendants Davis, Malone and Plemmons. The jury also awarded punitive damages against

defendant Armontrout in the amount of $10,000. This award is supported by the evidence and is affirmed.

Instruction No. 43 allowed the jury to find for plaintiff Wilson and against defendant Borghardt on plaintiff's claim that defendant Borghardt failed to supervise his subordinates on the bus to prevent the use of excessive force against plaintiff. The jury returned a verdict on this claim in favor of plaintiff and against defendant Borghardt and set the limit of his joint and several liability at $5,000, which is not listed in the total actual damages because it is duplicative. Defendant Borghardt's liability is based upon his failure to supervise adequately defendants Davis, Malone and Plemmons. The jury also awarded punitive damages against defendant Borghardt in the amount of $10,000. This award is supported by the evidence and is affirmed.

Accordingly, plaintiff Wilson is entitled to recover from the following individuals the following amounts:

(1) Defendant Arney, $2,000 actual and $4,000 punitive damages;

(2) Defendant Williams, $1,000 actual and $2,000 punitive damages;

(3) Defendant Wilson, $5,000 actual and $10,000 punitive damages;

(4) Defendant Davis, $2,500 actual and $5,000 punitive damages;

(5) Defendant Malone, $2,500 actual and $5,000 punitive damages;

(6) Defendant Plemmons, $1,000 actual and $2,000 punitive damages;

(7) Defendant Dennis, $5,000 punitive damages;

(8) Defendant Halley, $10,000 punitive damages;

(9) Defendant Riley, $10,000 punitive damages;

(10) Defendant Armontrout, $10,000 punitive damages; and

(11) Defendant Borghardt, $10,000 punitive damages.

The actual damage awards against defendants Dennis, Halley, Riley, Armontrout and Borghardt merely state the limits of their joint and several liability.

Therefore, plaintiff Wilson's total award is $14,000 actual damages and $73,000 punitive damages.

Conclusion

A review of the evidence and the verdicts clearly indicates that the jury believed that plaintiffs were subjected to the use of excessive force while they were at Missouri Training Center for Men at Moberly, Missouri, and while they were being transported by bus to the Missouri State Penitentiary at Jefferson City, Missouri.

Defendants' arguments in support of their motion for judgment notwithstanding the verdict or alternatively, for new trial, are not persuasive and will be denied. The verdicts are supported by the evidence.

A motion for judgment notwithstanding the verdict may be granted only when, without weighing the credibility of the evidence or substituting the court's judgment for that of the jury, there can be but one reasonable conclusion as to a proper judgment. *Taylor v. Cochran*, No. 86-2379, slip op. (8th Cir. Oct. 5, 1987). *See also Kort v. Western Surety Co.*, 705 F.2d 278 (8th Cir. 1983); *Russell v. United Parcel Service, Inc.*, 666 F.2d 1188 (8th Cir. 1981). In reviewing the evidence in light of and with all reasonable inferences favorable to plaintiffs, it cannot be said that no reasonable jury could have reached the conclusion reached by this jury.

The court may, to some extent, "weigh the evidence, disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict." *Quachita National Bank v. Tosco Corp.*, 686 F.2d 1291, 1295 (8th Cir. 1982) (citing *Slatton v. Martin K. Ebby Construction Co.*, 506 F.2d at 508 n. 4. In this case, there was substantial evidence supporting the verdicts and the issues which had to be resolved by the jury were essentially ones of credibility of the witnesses. In such a case, where there is substantial evidence on both sides and no clear reason to believe that an injustice has been done, it is inappropriate to overrule the jury and to substitute the court's judgment for that of the jury. Thus, defendants' motion for a new trial will not be granted. Remittur is appropriate only when the amounts awarded are clearly out of line with propriety. *See Farrin v. Richard Mfg. Co.*, 733 F.2d 526, 531 (8th Cir. 1984). Such is not the case here, except as noted previously. The verdicts are not contrary to the evidence, are not the result of jury passion or prejudice in favor of plaintiffs, and are not based upon any juror

misconduct. The jury instructions accurately presented the issues to the jury.

IT IS, THEREFORE, ORDERED that remittur is granted and the jury verdict in favor of plaintiff Bolin and against defendant Halley for punitive damages is reduced from $15,000 to $7,000 and the jury verdict in favor of plaintiff Bolin and against defendant Halley which sets the joint and several liability under Instruction No. 15 is reduced from $5,000 to $1,000. It is further

ORDERED that defendants' motions for judgment notwithstanding the verdict and for new trial are denied.

Dated this 14th day of April, 1988.

/s/ William A. Knox
WILLIAM A. KNOX
United States Magistrate

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-608

In The

Supreme Court of the United States

October Term, 1989

DR. LEE ROY BLACK, et al.,

Petitioners,

vs.

JOHN BOLIN, et al.,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

Respondents make the following additions and corrections to Petitioners' Statement of the Case.

Contrary to Petitioners' contention, this litigation did not arise from injuries received by Respondents as a result of excessive force used to quell a prison riot. "In the instant case, the beatings complained of by the prisoners occurred *after* any threat to institutional security had been quelled." *Bolin v. Black*, 875 F.2d 1343, 1350 (8th Cir. 1989).

Following the deadlocking of all inmates in their cells, corrections officials removed certain inmates from their cells and took them to the housing unit rotunda. All of the events which formed the basis for this litigation took place after the Plaintiffs were removed individually from their cell by two or more corrections officials. No inmate offered any resistance to the corrections officials at any time following their removal from their cell.

No claim rests upon any action taken by any Defendant in restoring order during the disturbance which had taken place earlier that evening prior to the deadlocking of all inmates in their cells.

As to the injuries inflicted upon the Respondents, Bolin testified that he was kicked hard when taken from his cell. He was badly beaten, the pain from the blows he received lasted several days and he had a headache for a good two days.

McWorthy testified the blows he endured in Housing Unit 2 were forceful blows meant to cause pain and they did, one of the blows dislocated his jaw and cracked some

of his teeth. The guards on the bus were putting their weight into their punches; the pain from their blows brought tears to his eyes. He was bruised and sore up and down his back and on his shoulders and legs from being beaten.

Wilson testified he was hit with hard blows which were intended to cause pain and which caused pain through his whole body; the blows caused him to cry out and brought tears to his eyes. The blows and pain he sustained caused him to have a bowel movement while in the rotunda. The blows he received in the bus "hurt real bad".

REASON FOR DENYING THE WRIT

A. The Eighth Circuit Court of Appeals adopted a correct Eighth Amendment Analysis of Petitioners' liability arising from the use of force in a situation not involving the preservation of internal order and discipline nor taken to maintain institutional security.

Petitioners' arguments are not with the application of the law to agreed upon facts but are based upon Petitioners' rejection of the facts found by the jury, the trial judge and the Eighth Circuit Court of Appeals. In each instance the conclusion the deliberating body reached was that the beatings complained of in this case took place "after prison officials had restored order to the facility" and "after any threat to institutional security had been quelled". *Bolin v. Black*, 875 F.2d 1343, 1346 (8th Cir. 1989).

Petitioners continue to erroneously maintain that the facts in the instant case compare with the facts existent in *Whitley v. Albers*, 475 U.S. 312 (1986). Albers was shot by a corrections officer while prison officials were attempting to retake control of the cell block, a guard was still held hostage, numerous inmates were outside their cells and one inmate was armed with a knife. *Id.* at 322-3.

In this case, after all inmates were locked down in their cells, Respondents were removed from their cells, handcuffed and then beaten and abused. An entirely different factual situation from that addressed by this Court in *Whitley*.

An Eighth Amendment claimant is required to "prove the unnecessary and wanton infliction of pain" to establish the imposition of cruel and unusual punishment. *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); *Whitley* at 319; *Graham v. Conner*, 109 S.Ct. 1865, 1873, n.11. (1989). Only when the force complained of is applied as a prison security measure to resolve a disturbance must the claimant show that the force was applied maliciously and sadistically and not in a good faith effort to maintain or restore order. *Whitley* at 1085.

In this case, as the force complained of was neither applied to resolve a disturbance nor as a prison security measure, the *Whitley* standard is inapplicable.

Petitioners point to the decision of the Eight Circuit Court of Appeals in *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) to demonstrate "confusion in the courts" in applying the *Whitley* standard. Petitioners compare the facts of *Cowans* ("[An] inmate locked in his cell creates a security disturbance by refusing to close his food service

slot.", Petitioners Brief P. 10) with the facts in *Bolin* ("[S]ecurity measures enacted to quell a full scale prison environment in which one officer was killed and several injured does not give rise to a security disturbance." *Id.* at 11). Once again Petitioners ignore or alter the facts of the case so as to advance this argument. The Eighth Circuit Court of Appeals specifically addressed the question of the applicability of the *Whitley* standard and the Eighth Circuit's decision in *Cowans* and found the present case to be outside the purview of both *Whitley* and *Cowans* because the beatings complained of in this case "occurred *after* any threat to institutional security had been quelled". *Bolin* at 1350.

The present case is neither a situation requiring immediate corrective action nor one involving the resistance by an inmate of the orders given to him. Confusion does not exist in the application of the *Whitley* standard by the Eighth Circuit Court of Appeals in cases involving Eighth Amendment claimants.

B. *Whitley v. Albers* did not alter the "deliberate indifference" standard in Eighth Amendment claims not involving institutional security.

This Court in its opinion in *Whitley* reaffirmed the "deliberate indifference" standard in Eighth Amendment cases when it quoted approvingly from *Ingraham v. Wright*, 430 U.S. 651 (1977) that after incarceration only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment. *Whitley*, at 319.

This Court did find the "deliberate indifference" standard to be inappropriate in those cases in which the

force complained of was undertaken to restore order or to resolve a disturbance. *Whitley* at 320-1. As set out in the Statement of Case and the lower court's decision such was not the situation in this case. *Bolin* at 1346.

There is no need now for this Court to undertake any further clarification of this field of law through a review of this case.

C. The *Bolin* jury was properly instructed as Eighth Amendment liability rests upon the infliction of pain while the award of compensatory damages rests upon the proof of damages by the Claimant.

Cruel and unusual punishment in violation of the Eighth Amendment is grounded upon the unnecessary and wanton infliction of pain, *Ingraham* at 670; *Whitley*, at 319; *Graham v. Conner*, 109 S.Ct. at 1873, n.11.

Petitioners' allegation that the jury award in the instant case was allowed "to stand despite the fact that the jury was not required to consider the extent of injuries suffered by Plaintiffs" is without basis in fact.

The jury in the instant case considered the nature and extent of the injuries sustained by the Claimants on two distinct occasions. First the extent of the injuries each Claimant sustained was considered by the jury in its application of Instruction No. 11. To find that the claimant had been subjected to cruel and unusual punishment in violation of the Eighth Amendment, the jury was required to find the claimant had suffered "Pain" as described and defined in Instruction No. 11. That instruction made it abundantly clear that minimal discomfort or

injury was not sufficient to give rise to a constitutional violation. The jury determined that a constitutional violation had occurred. In responding to the Petitioners' Motion for Judgment notwithstanding the verdict, the trial court stated that this finding was supported by the evidence. Petitioners' Appendix P. 51. Petitioners did not raise the question of the sufficiency of the evidence to sustain the findings of Eighth Amendment violations on appeal. *Bolin* at 1346-7.

Once the jury had found that claimants had sustained pain or injury of sufficient severity to constitute an Eighth Amendment violation, the jury then had to determine the amount of any damages to be awarded to Claimants. Instruction No. 44 provided the methodology the jury was to follow in making this determination. (Appendix 1). Petitioners never objected to this instruction, nor do they contend it is erroneous. *Bolin* at 1350.

In applying Instruction No. 44 the jury returned compensatory damages in amounts ranging from $1,000 to $5,000. These awards clearly demonstrate the jury's careful appraisal and evaluation of each claimants injuries.

Petitioners express concern that every common law battery will become the subject of constitutional litigation. Petitioners cite six cases in which Circuit Courts of Appeal affirmed a decision against an Eighth Amendment claimant because the injury claimed was not of constitutional severity in that the Claimants did not suffer "unnecessary and wanton infliction of pain". Each of the cases cited by Petitioners is in consonance with the law enunciated by this Court relating to Eighth Amendment claims; in each instance the lower court found the

alleged injury was not of constitutional magnitude. Nor are any of these cases at variance with the instant case; here the lower court and appellate court concurred with the jury that the injuries inflicted were of constitutional magnitude.

CONCLUSION

The legal principles relating to Eighth Amendment claims will not be clarified by the Court's grant of Certiorari in this case nor does any conflict or confusion in the decisions of the Circuit Courts of Appeal exist which could be resolved by the Court's consideration of this case. Respondents respectfully request the Court deny the application for Writ of Certiorari.

Respectfully submitted,

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INSTRUCTION No. 44

If you find the issues in favor of plaintiff then you must award plaintiff such sum as you believe will fairly and justly compensate him for any damages you believe he sustained as a direct result of the conduct of that defendant against whom you find the issues presented.

Damages must be reasonable. You are not permitted to speculate on the amount of damages. Further, if you find the issues in favor of a plaintiff on more than one of the claims, you may not award that plaintiff compensation for any item of damage more than once.